IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

SECOND APPEAL No.1297 OF 1994
AND
C.M.P.No.15788 OF 2004

C.Manoharan ... Appellant/Second Plaintiff

Vs.

1.C.V.Subramaniam
2.C.S.Nithiyanandam
3.C.V.Chandrasekar
4.Roja Ammal
5.Thatchayini
6.Indira
7.Vetriselvi
8.Tamilselvi
9.Kalaiselvi ... Respondents/Defendants
(Impleaded as Respondents 7 to 9 vide Order of Court dated 12.9.06 made in Judgment (Page No.14, Para 17 in S.A.)

* * *

Second Appeal preferred under Section 100 of the C.P.C., as against the judgment and decree dated 13.8.1994 rendered in A.S.No.59 of 1993 by the learned Subordinate Judge, Chengalpattu thereby reversing the judgment and decree dated 13.9.1993 rendered in O.S.No.303 of 1983 by the learned District Munsif, Chengalpattu.

For appellant : Mr.T.V.Ramanujam, S.C. for M/s.T.V.Krishnamachari

For R.1 to R.3 : No appearance
For R.4 to R.6 : Mr.T.R.Rajagopalan, S.C.for M/s.K.Bhanumathi, K.Chandramouleeswaran

For RRs 7 to 9: Mr.R.Subramanian for M/s.Hema Sampath

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The parties are referred to as per their ranking in O.S.No.303 of 1983.

2. The second plaintiff is the appellant.

3. The appellant and his brother by name Koteeswaran @ Veerasamy have filed the suit for declaration of their title to the suit property, as well as for permanent injunction. As seen from the description of the property, the suit property is a building and site bearing Door No.105, situated in T.S.No.358/2.

4. The plaintiffs' claim title to the suit property, pursuant to a settlement deed, executed by their grand father on 9.8.1956. According to them, the suit property originally belonged to their grand father Vedachalam and he, having the competency to gift the property, had gifted the same to the plaintiffs, though the third defendant was given the right to derive the income. In view of the specific recitals in the settlement deed, the third defendant has no absolute right or transferable interest and this being the position, the attachment of the properties, for the realisation of the decree amount, against the third defendant, in O.S.No.62 of 1976, is neither valid nor binding upon the plaintiffs and this should follow, the subsequent Court auction and the purchase of the property by the Court auction purchasers viz. Devaraj Naicker, are invalid. Taking advantage of the Court auction and the confirmation of the sale, the defendants are attempting to disturb the possession of the plaintiffs, even denying the title. Thus alleging, inter alia, a suit came to be filed in O.S.No.303 of 1983 on the file of the District Munsif, Chengalpattu.

5. The contesting defendants, disputing the settlement said to have been executed by Vedachalam, as well as questioning the character of the suit property, have contended before the Courts below, that the suit property was attached in the Court proceedings, brought for sale, in which, one Devaraj Naicker had purchased the same and this being the position, neither on the basis of the settlement deed said to have been executed by Vedachalam, nor on the basis of the release deed, said to have been executed by the third defendant, the plaintiffs' are entitled to claim declaration as well as for injunction, in view of the further fact, the suit is engineered by the third defendant. On the basis of the above allegations and on certain other averments also, by the contesting defendants, the suit was opposed.

6. Based upon the above pleadings, the learned District Munsif, Chengalpattu, framing as many as seven issues, directed the parties to proceed with the trial, to establish their respective claims. After completion of the trial, the learned District Munsif, evaluating the

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oral, as well as the documentary evidence, came to the conclusion that the suit property originally belonged to Vedachalm and therefore, he had the right to execute the settlement deed; that since the execution of the settlement deed is proved, it should have its validity and enforceability; that the plaintiffs' are in possession and enjoyment of the same, not only on the date of filing of the suit, but also subsequent to the filing of the suit; that the life estate, if any, given to the third defendant, was released by him in favour of the vested reminders viz. the plaintiffs and therefore, on the basis of the settlement deed, as well as on the basis of the release deed, the plaintiffs became the absolute owners of the suit property. Taking the above conclusion, the suit was decreed, as prayed for with costs, as per the judgment dated 13.9.1993, which was impugned, by the unsuccessful contesting defendants, before the first appellate Court, viz. by the defendants 4 to 6, who are the L.Rs. of the auction purchaser.

7. The learned Subordinate Judge, Chengalpattu, after hearing the submission of either counsel, re-assessing the materials available on record, and placing much reliance upon the judicial precedent also, felt, as could be seen from the judgment, that the trial Court has not properly appreciated the case from its proper perspective, resulting landing in an erroneous conclusions. The learned first appellate Judge, came to the conclusion that under the settlement deed, vested reminders alone given to the plaintiffs, giving life estate to their father viz. the third defendant-Chandrasekar; that as per the Court auction and Court sale, followed by issuance of sale certificate under Ex.B.10, the right of the third defendant had been extinguished and therefore, the subsequent release deed executed by him, favouring the sons, is not valid in the sense, on that date, he had no transferable interest i.e. life estate also; that during the lifetime of third defendant, viz. C.V.Chandrasekaran-the father of the plaintiffs', the suit filed for declaration of their title, is not maintainable. It is the further conclusion of the learned first appellate Judge that pursuant to the sale certificate issued by the Court, the auction purchaser is entitled to recover the possession legally, and that cannot be prevented, by way of permanent injunction. Arriving at the conclusions, as said above, the appeal was allowed, setting aside the decree and judgment of the trial Court, which will amount to the dismissal of the suit. Aggrieved by the decision of the first appellate Court, dated 13.8.1994, the Second Appeal has been preferred by the second plaintiff, since the first plaintiff expired during the pendency of the first appeal, as reported, at present.

8. This Court, at the time of admission, while perusing the records, felt, some substantial question of law has not been properly considered and the same should be decided by this Court, thereby framing the following Substantial Question of Law, for consideration, which reads:

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"Whether the lower appellate Court has properly appreciated the law relating to legal interpretation of "vested interest" and "contingent interest" as per the provisions of the Transfer of Property Act?"

9. Heard Mr.T.V.Ramanujam, learned senior counsel for the appellant, Mr.T.R.Rajagopalan, learned senior counsel for the respondents 4 to 6 and Mr.R.Subramanian, learned counsel for the petitioners in C.M.P.No.15788 of 2004, with no representation for the respondents 1 to 3, despite notice.

10. Mr.T.V.Ramanujam, the learned senior counsel appearing for the appellant, argued that the construction or interpretation given to the settlement deed, by the first appellate Court, is erroneous, since the father of the plaintiffs' was not at all given any life interest and this being the position, nothing could have been brought for auction in the Court sale, affecting the rights of the plaintiffs, who are admittedly, entitled to the properties, as per the wishes of the settlor. It is also the submission of the learned senior counsel that during the pendency of the first appeal, one of the plaintiffs, viz. the first Plaintiff, died and without bringing the legal representatives of the first plaintiff on record, a judgment has been rendered, which should be construed, in the eye of law, as nullity and in this view also, the judgment and decree of the first appellate Court in A.S.No.59 of 1993, should go.

11. Responding to the above submissions, the learned senior counsel Mr.T.R.Rajagopalan, appearing for the contesting respondents, would submit that even as per the grounds raised in the Second Appeal, there is no plea or case, as if the judgment and decree granted by the first appellate Court, is a nullity and in this view, the appellant is not entitled to urge the same. It is the further submission of the learned senior counsel that even assuming that the judgment has been rendered, without bringing the L.Rs. of the first plaintiff, because of the survival of cause of action, as held by the Apex Court and as envisaged under Order 22 CPC, the judgment and decree granted by the first appellate Court should survive, if it is not otherwise questionable on merits.

12. The last submission of the learned senior counsel for the respondents was that even as per the settlement deed, executed by Vedachalam Mudaliar, if it is to be properly construed, that conferred life estate in favour of the father of the plaintiffs and that life estate was brought for sale, sold in the court auction and during the lifetime of the third defendant-father, the plaintiffs are neither entitled to declaration nor injunction, preventing the auction purchaser from enforcing the Court sale, followed by sale certificate.

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13. One Vedachalm Mudaliar had two sons, by name C.V.Chandrasekaran-the third defendant and C.V.Subramanian-the first defendant. The second defendant by name C.S.Nityanandam is the son of the first defendant. The plaintiffs are the sons of the third defendant. It is the specific case of the plaintiffs, that the suit properties originally belonged to Vedachalam, as his separate property. Though the same was disputed at the initial stage, at this stage, it is not disputed. Therefore, on the ground, Vedachalm was the owner of the suit property, the settlement deed executed by him and its effect have to be considered. The plaintiffs' claim is purely based upon two documents and they are Exs.A.31 and A.32. The suit is opposed mainly on the basis of the decree in O.S.No.62 of 1976 and the follow-up action viz. the execution proceedings, which culminated into a sale certificate, exhibited as Ex.B.10. Before going into the question of vested interest and contingent interest, as formulated in the Substantial Question of Law, first let me consider the submission of Mr.T.V.Ramanujam, the learned senior counsel for the appellant, whether the judgment and decree passed by the first appellate Court is a nullity.

14. As seen from the appeal memo. of the first appellate Court, in A.S.No.59 of 1993, the death of the first plaintiff by name Koteeswaran @ Veerasamy was not reported, recorded, L.Rs. also not brought on record. In the appeal memo. before this Court, it is stated:

> "The 1st Plaintiff Kotiswaran alias Veerasami, who was the 1st respondent in A.S.No.59 of 1993 died on 12.7.1994 and his legal representatives have not been brought on record. Hence, this appeal is filed by the 2nd Plaintiff on whom the cause of action survives."

thereby showing, the judgment and decree in A.S.No.59 of 1993 is not challenged on the ground of nullity, as if a judgment was passed against a dead person. Therefore, the appellant is not entitled to raise the same. However, considering the admitted position and to have fullness and to avoid this point being raised once again elsewhere, the parties are permitted to argue on this point also, since it would come within the meaning of 'Substantial Question of Law' also.

15. It is submitted by the learned senior counsel for the appellant that the first plaintiff Koteeswaran @ Veerasamy died on 12.7.1994, whereas the first appellate Court rendered its judgment only on 13.8.1994, thereby showing that on the date of the judgment, the first plaintiff was not alive and in this view, it should be construed, this is a judgment against a dead person, leading to the conclusion of nullity. In support of the above submissions, my attention was drawn to a decision of the Apex Court in STATE OF PUNJAB vs. NATHURAM (AIR 1962 SC 89). In the case involved in the above decision, the Arbitrator passed a joint Award granting a higher compensation and also certain

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sum on account of income-tax, which was appealed. During the pendency of the appeal, one of the respondents died and his legal representatives were not brought on record. Then, the question was 'whether appeal abated or it survived as far as the remaining respondent is concerned'. The Apex Court, considering the joint decree, as well as the contradictory decision also would arise, if decided on merits, without legal representatives, against the dead person, as well as against the remaining person, appears to have held, that the appeal also abated against the surviving respondent also. While concluding so, the Apex Court has also said, in no uncertain terms:

> "The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed."

If this kind of situation arises or available, certainly, a decree and judgment passed against a dead person may be a nullity, as held by the Apex Court in AMBA BAI AND OTHERS vs. GOPAL AND OTHERS (2001 (3) CTC 52).

16. In the case referred to above, decree passed against a dead person was considered, including the survival of cause of action, upon the surviving plaintiff or plaintiffs. In the case involved in the above decision, in a suit for specific performance, filed by one Lakshmilal against Radhu Lal, suit was dismissed, appeal allowed by the first appellate Court, which was challenged by the defendant Radhulal in a second appeal in the High Court. When the case was pending before the High Court, plaintiff died, L.Rs. were brought on record. On 14.3.1990, the appellant there also died and this fact was not brought to the notice of the Court and the appeal was dismissed on 23.5.1991, without bringing the L.Rs. of the defendant/appellant therein. Considering the above facts and circumstances of the case, the sole defendant died, cause of action has not survived, the Apex Court has held, judgment passed in Second Appeal against a dead person is a nullity and this kind of situation is not available in the case on hand.

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17. In the first appellate Court, the plaintiffs have been shown as respondents 1 and 2. Only one plaintiff died, which fact was not brought to the notice of the Court, when the argument was proceeding. Therefore, the first appellate Court, without knowing, under the presumption that the parties are available, since the matter was argued by the counsel appearing for the parties, rendered a judgment, of course, after the death of the first plaintiff, but not bringing his L.Rs. on record. In this case, both the plaintiffs claim title to the suit property, pursuant to the settlement deed. The settlement deed gives right to both the plaintiffs, thereby showing cause of action would survive, to some extent, not abating the appeal in toto, whether the remaining plaintiff would take the property in entirety or not, which is not the concern of the Court. If at all any L.Rs. are there for the first plaintiff, they should have come on record, which is belatedly done by them at this stage, by filing C.M.P.No.15788 of 2004. By impleading the petitioners in C.M..No.15788 of 2004, their right cannot be decided here, and if at all, they have to work out their remedy by filing a suit for partition, when their predecessors-in-interest would have acquired absolute interest, which is left open. For allowing this application, no serious objection has been raised. Hence, this petition is allowed.

18. Mr.T.R.Rajagopalan, learned senior counsel for the contesting respondents, drawing my attention to Order 22, Rule 10-A CPC, supported by a decision of the Apex Court in P.JESAYA (DEAD) BY LRS. vs. SUB-COLLECTOR AND ANOTHER [(2004) 13 SCC 431], would submit that the pleader for the parties not having discharged his duty to inform the Court and other parties, of the death, and continued to plead matter, L.Rs. of respondent were bound and in this view, it should be held, appeal had not abated. In the case involved in the above decision, a similar situation like the one in the case on hand had arisen. The Apex Court, considering the amended provisions of the Code of Civil Procedure, under Order 22 Rule 10-A CPC, as well as the duty of the Pleader, came to the conclusion, that the decree passed cannot be treated as nullity, even referring the decision relied on by the counsel for the appellant in Ambabai case. Therefore, as per the ratio laid down by the Apex Court in P.Jesaya case, it is to be held, that the decree passed in A.S.No.59 of 1993 is binding upon the L.Rs. of the first plaintiff also and the decree cannot be treated as a nullity. Because of this reason also, as indicated above, in the grounds of appeal, when appeal is preferred by only the second plaintiff, it is specifically stated, cause of action survives and this being the admitted position, even by the appellant, the submission made by the learned senior counsel for the appellant, in my considered opinion, is erroneous, liable to be rejected. Thus holding, the decree in A.S.No.59 of 1993 is valid, now it is to be seen as per the Substantial Question of Law framed, whether that could be sustained or not, on merits.

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19. Ex.A.31, dated 9.8.1956 is the settlement deed executed by Vedachalam Mudaliar in favour of his son Chandrasekaran Mudaliar, the third defendant herein, on 9.8.1956. Admittedly, on the date of the execution of the settlement, the plaintiffs were not born. As rightly submitted by the learned senior counsel, placing reliance upon Sections 13 and 20 of the Transfer of Property Act, on a transfer of property, if an interest is created, for the benefit of a person not in existence on the date of transfer, the same should be recognised, when the contingency occurs. In this case, the third defendant begotten children and therefore, the wish of the settlor under Ex.A.31 should be honoured. The settlement deed is not challenged before me, on the ground that it is invalid or otherwise. The only point urged, on behalf of the contesting respondents regarding the settlement deed was, it had created vested interest in favour of the plaintiffs, conferring life interest in favour of the third defendant and during the lifetime of the third defendant, the vested reminders are not entitled to claim absolute title. The life estate being a transferable interest, if it had extinguished by the legal proceedings, during the lifetime of that person, the person derived interest must enjoy the benefit, was the submission on behalf of the contesting respondents. Therefore, we have to see what is the interest given to the third defendant.

20. Ex.A.31 recites:

"அடியிற்கண்ட சொத்தை நீயே கைப்பற்றி அதை யாதொரு பராதீனமும் செய்யாமல் அதில் வரும் வரும்படியை மாத்திரம் உன் ஜீவதிசைவரையில் அனுபவித்து வந்து பிறகு உன் விவாகமான பாரியாளுக்கு பிறக்கும் ஆண் சந்ததிகளுக்கு சர்வ சுதந்திர பாத்தியமாய் தானாதி வினிமய விக்கிரியங்களுக்கு குறித்தாய் ஆண்டு அனுபவித்து கொள்ளவும்."

21. According to the learned senior counsel for the appellant, the right given to the third defendant under this document is only to enjoy the income, which will not come within the meaning of 'life estate' and this being the position, the Court auction sale, bringing the property for sale, as if the third defendant had some transferable interest, is invalid. After hearing the submission of either counsel and deeply considering the recitals indicated above, which shows the intention of the testator, to favour the third defendant, during his lifetime, as well as to safeguard the property for the next generation to come, I am of the considered opinion that under this document, life estate was given to the third defendant to enjoy the property also and not restricting to get the income alone, preventing him from enjoying the property, which is not possible also.

22. Admittedly, at the time of the execution of the document, the plaintiffs were not born. Therefore, somebody should enjoy the property and possession should vest with them. Unless possession is

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given, enjoyed, income cannot be derived. In this view alone, a right is given to the third defendant, that he should take possession of the property, enjoy the same, without any encumbrance and take the income also during the lifetime. This aspect was very well considered by the first appellate Court elaborately, placing reliance upon the judicial precedent, which need not be repeated once again, since those findings, as such, require confirmation, not warranting any disturbance, since there is no error of law. Thus settling the third defendant was given the life estate, now we have to see, whether the plaintiffs could claim absolute title at present.

23. It is an admitted fact that there was a decree against the third defendant in O.S.No.62 of 1976. It is also an admitted fact that the property was brought for sale, auction took place on 12.9.1979 and sale has been confirmed on 13.12.1982, thereby showing that the interest of the third defendant, in the suit property, was sold in the Court auction on 12.9.1979 itself. Therefore, he has no competency or right, to release his life interest, in the suit property, in favour of the vested reminder holders viz. the plaintiffs herein. But, curiously, as well strangely also, probably to avoid the Court proceedings, the third defendant executed a release deed on 29.7.1983 (Ex.A.32) on which basis, the plaintiffs claim absolute interest. On the date of the alleged release under Ex.A.32, the third defendant had no interest, since the said interest had already been auctioned in the Court, purchased by Devaraj Naicker. This being the position, on the basis of Ex.A.32, the plaintiffs cannot claim absolute right on the ground, the life estate holder had released his interest in their favour, forgetting the fact, that interest was not available on the date of execution of Ex.A.32, dated 29.7.1983. It is an admitted position that on the date of the Court sale, what was the right available in the property to the judgment debtor alone should have been sold in Court auction. In the case on hand, on the date of Court sale, the third defendant/judgment debtor had the life interest, that was brought for sale and to that extent, the Court sale is valid and pursuant to the Court sale, the auction purchaser or his L.Rs., as the case may be, are entitled to take delivery of possession also. Therefore, injuncting them from taking possession, indirectly, though the plaintiffs may be in possession of the property, is not legally possible in this case. The learned Subordinate Judge, very elaborately considered the legal positions, as well as the effect of Exs.A.31 and A.32 and Ex.B.10, based upon the judicial precedent, in my considered opinion, came to an unerring conclusion, which requires only confirmation, answering this Substantial Question of Law accordingly.

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In the result, the appeal fails and the same is dismissed with costs, confirming the judgment and decree dated 13.8.1994 rendered in A.S.No.59 of 1993, by the learned Subordinate Judge, Chengalpattu.

Sd/
Asst.Registrar

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Sub Asst.Registrar

Rao

To

1.The Subordinate Judge,
Chengalpattu.

2.The District Munsif,
Chengalpattu.

3.The Section Officer,
VR Section, High Court, Madras -104.

+1cc to Mr.T.V.Krishnamachari, Advocate Sr 42530
+1cc to M/s. K.Bhanumathi, Advocate Sr 42333
+1cc to M/s. Hema Sampath, Advocate Sr 42326

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